Michael K. Jeanes, Clerk of Court
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09/04/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2006-050443 08/30/2012

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
C. Vigil
Deputy

IN RE THE MARRIAGE OF
AMY L PRICKETT KIILU DAVIS

AND

JASON R PRICKETT GREG R DAVIS

FAMILY COURT SERVICES-CCC

MINUTE ENTRY

This Minute Entry follows an evidentiary hearing held on August 23, 2012 regarding these two issues:

i. Whether child support should be modified, and if so, (a) in what amount and (b) whether that modification should be retroactive?

ii. Whether Respondent/Father Jason R. Prickett should be held in contempt for failing to pay a judgment for attorney's fees entered against him and in favor of Petitioner/Mother Amy L. Prickett.

[Minute Entry 5/30/12][1]

[1] At the August 23 hearing, the Court accepted the parties' stipulation admitting all exhibits in evidence. That does not mean, however, that the Court is required to give equal weight to each such exhibit, and the Court does not do so here. When making its factual determinations, a Court acting in the role of fact finder may accept all, only some, or none of what an exhibit may say. *Cf. Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993); *Nardella v. Campbell Mach., Inc.*, 525 F.2d 46, 49 (9th Cir. 1975).

Child Support.

There is no dispute here that the parties' two children live substantially with Father. Although a therapeutic interventionist has been assisting in the development of plans that would have the children spend more time with Mother than they have in the relatively recent past, no persuasive evidence suggests that anything approaching an equal parenting time arrangement will materialize anytime soon. Indeed, the oldest of the two children will soon begin college.

Father maintains that child support should be modified to reflect the parenting time arrangement as it exists. Despite that, Mother maintains that any child support modification should reflect equal parenting time. Mother's position is premised on the assumption that, had Father cooperated with reunification efforts sooner and more enthusiastically than he did, an equal parenting time arrangement would be operating successfully now.

The Court previously found that Father had acted unreasonably, accepting the evidence at that time that either overtly, or at least by failing to act when he should have, he exacerbated the relationship between Mother and the children. [See generally Judgment (5/12/11); see also Hearing Ex. 9] At the same time, the Court is mindful of more recent evidence suggesting that Father has assisted in efforts to promote a healthier relationship, and thus, more parenting time, between Mother and the children. [See Hearing Ex. 11 at 1 (statement of therapeutic interventionist that Father has done everything asked of him); see also Hearing Ex. 12 (stating that Father "took charge" in getting the children to cooperate with Mother)]

For purposes of establishing how much parenting time Mother would be experiencing today, the extent to which Father's conduct has been unproductive, if not counterproductive, is, in substantial measure, beside the point. That is because evidence establishes that Mother's lack of parenting time may be attributable to other causes, such as the youngest child's affliction with diagnosed attention and behavior problems, and "seven years of . . . abuse" that the oldest child attributes to Mother. [Hearing Ex. 11 at 2, 5] Given those other causes that may have contributed to Mother's reduced parenting time, it becomes impossible to determine the extent to which Father can be held responsible.

In short, even if Father's conduct, to some degree, explains why Mother is not experiencing equal parenting time, under no authority that has been brought to the Court's attention can it be said that one may, on the record here, simply assume equal parenting time any more than one may assume that a 60 percent (Father) - 40 percent (Mother) or an 80 percent (Father) – 20 percent (Mother) arrangement would be in effect. In other words, when attempting to quantify the amount of Mother's parenting time that would be in effect but for Father's conduct, the evidence here permits no more than a guess. As such, the Court cannot modify

child support that would credit Mother with equal parenting time. *Cf. Gilmore v. Cohen*, 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963) (recognizing that one who is injured by another's misconduct must, nevertheless, prove damages with "reasonable certainty"); *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 608, ¶36, 233 P.3d 1169, 1187 (App. 2010) (same); *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 165, ¶48, 158 P.3d 877, 888 (App. 2007) (same).

Child Support Order.

Accordingly, on the record here, the Court has no alternative but to adopt the child support worksheet that is separately filed. This modification is effective April 1, 2012.

The worksheet shows a monthly child support obligation owed by Mother to Father in the amount of $390.18. But, because the Court has concluded that the children's best interests would be best served if Mother's resources were available for any necessary therapy and counseling that the youngest child needs, including any therapy or counseling necessary to repair the parental relationship, the Court allows a downward deviation so that no child support is owed.

Any child support paid by Father to Mother since April 1, 2012, shall be credited against the May 12, 2011, Judgment entered in Mother's favor and against Father.

IT IS SO ORDERED.

LET THE RECORD REFLECT the Income Withholding Stop Order is initiated electronically by the above-named deputy clerk. (Confirmation # 380558)

Contempt.

The Court previously granted Mother's request for an award of attorney's fees and entered judgment accordingly. [Judgment (5/12/11)] There is no dispute here that Father has not paid the amount that was awarded.

Contempt requires a finding that a party "violated a specific and definite order of the court." *BMO Harris Bank Nat'l Ass'n v. Bluff*, 229 Ariz. 511, 514, ¶7, 277 P.3d 216, 219 (App. 2012). The Judgment did not establish a deadline by which payment must be made. [Judgment (5/12/11] During the hearing, the Court explained on the record its conclusion that, absent such a deadline, Father has not been provided with sufficient notice (i.e., with a sufficiently "specific and definite order") that would let him know what to do to avoid contempt.

Later, while undertaking research for a unrelated case regarding an unrelated issue, the Court more or less stumbled across the following:

> "A trial court may enforce orders for the payment of attorney's fees through civil contempt proceedings. *See Korman v. Strick*, 133 Ariz. 471, 652 P.2d 544 (1982); *Masta v. Lurie*, 22 Ariz. App. 170, 171, 525 P.2d 301, 302 (1974); *Johnson v. Johnson*, 22 Ariz. App. 69, 71, 523 P.2d 515, 517 (1974) ("[A]ttorney's fees awarded in a decree of divorce are enforceable by post judgment contempt in the same manner as alimony or child support could be enforced."); Charles Marshall Smith & Irwin Cantor, *Arizona Practice, Marriage Dissolution Practice*, §273, at 281-82 (1988). Thus, the trial court had subject matter jurisdiction to find [Husband] in contempt for his admitted failure to comply with [the trial judge's] order that had awarded attorney's fees and costs to [Wife]." *Danielson v. Evans*, 201 Ariz. 401, 412, ¶40, 36 P.3d 749, 760 (App. 2001).

That language in *Danielson* is categorical. Therefore, despite its earlier misgivings, the Court now concludes that it has no alternative but to schedule an evidentiary hearing regarding Mother's request for a finding of contempt based on Father's failure to pay the amount awarded as attorney's fees. The hearing will be scheduled by separate Minute Entry, and each side will be allowed 30 minutes to present evidence and argument. In the Court's view, that should be a sufficient amount of time because only two factual issues will require resolution, one of which should not be disputed:

i. How much of the Judgment has <u>not</u> been paid?[2]

ii. Has Father had the ability to pay more than he has paid?

The scheduling of this hearing is without prejudice to Respondent urging that *Danielson* does not apply. The parties are required to exchange updated Affidavits of Financial Information and their exhibit lists with one another not later than 10 days before the hearing. All discovery must be completed not later than 20 days before the hearing.

Meanwhile, Mother also has available to her all remedies that are available to any judgment creditor. See M. M. Clark, ARIZONA CIVIL REMEDIES (3d ed. 2011) at §§ 3.10-3.15, 3.22-3.23.

[2] "Judgment" means the net amount owed for attorney's fees after crediting Father for child support payments made since April 1, 2012.

Appealable Order.

By the Court's signature below, this becomes a final, formal, and appealable order from the date of entry by the Office of the Clerk that appears on page 1 above. Ariz. R. Fam. L. P. 81.

IT IS SO ORDERED.

/s/ HONORABLE DOUGLAS GERLACH

JUDGE OF THE SUPERIOR COURT

FILED: Exhibit Worksheet, Child Support Worksheet

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter.